STATE OF MICHIGAN
IN THE SUPREME COURT

Request for Certified Question From the U.S. Court of Appeals for the Ninth Circuit

IN RE CERTIFIED QUESTION,

PETER DEACON, Docket No. 151104

Plaintiff-Appellant,

vs.

PANDORA MEDIA, INC.,

Defendant-Appellee.

APPELLEE'S RESPONSE BRIEF IN SUPPORT OF REQUEST FOR A CERTIFIED QUESTION FROM THE NINTH CIRCUIT COURT OF APPEALS

ORAL ARGUMENT REQUESTED

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INTRODUCTION[1]

After three years of litigation and briefing in the district court, the Ninth Circuit, and now this Court; and after being given the opportunity to amend his complaint (which, tellingly, he declined to do); Plaintiff still has not found a way to transform Pandora's Internet radio service into a song-lending or song-renting business. To the contrary, Plaintiff's complaint and briefs show the opposite – that Pandora's Internet radio service has none of the characteristics of "renting" or "lending". Among other things:

- Pandora listeners do not pay for the songs that are streamed to them, meaning they do not "rent" the songs;[2]
- Pandora listeners do not return the songs that are streamed to them, meaning that Pandora does not "rent" or "lend" them the songs; and
- Pandora does not give its listeners control over the songs that it streams to them, but both control, and relinquishment of control, are necessary elements of both "renting" and "lending".

Given the above, the District Court found that Pandora was *not* in the business of "renting" or "lending" sound recordings, and dismissed Plaintiff's complaint. On appeal, the Ninth Circuit did not rule on the merits but instead certified the following question to this Court: whether "Deacon has stated a claim against Pandora for violation of the VRPA [the Michigan

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[1] This Court instructed the parties to each file a brief addressing two issues: 1) whether this Court should accept the certified question from the Court of Appeals for the Ninth Circuit, and 2) how the certified question should be answered. Plaintiff-Appellant's initial brief addressed only the first of these two questions. After Defendant-Appellee Pandora Media, Inc. ("Pandora") filed a brief addressing both, Plaintiff filed a brief entitled "Brief on Merits of Certified Question" ("Pl's Br.") discussing the second point. The Court has permitted Pandora to file this response to that brief, as an appellee typically has a right to do (because the appellee is not usually the first to argue the merits – or more accurately, the lack thereof – of an appeal). In this response, Pandora incorporates by reference its prior brief and rather than repeat the points made therein, will limit this document to responding to Plaintiff's Brief.

[2] Pandora's paid service is not at issue in this lawsuit.

Video Rental Privacy Act, MCL 445.1711 *et seq*.] by adequately alleging that Pandora is in the business of 'renting' or 'lending' sound recordings, and that he is a 'customer' of Pandora because he 'rents' or 'borrows' sound recordings from Pandora?" (Appx. 298a-299a.) Both parties seem to agree with the district court's primary finding: that "renting", "borrowing", and "lending" all require use and control of the material at issue by the purported borrower/renter. Thus, the question before this Court is whether the complaint alleges facts supporting the conclusion that Pandora listeners have the ability to use and control the sound recordings that are streamed to their electronic devices.

The answer to this question is "no". Pandora listeners do not have the ability to use and control the sound recordings that are streamed to their devices. They cannot pick the particular songs that Pandora plays, they cannot pick the particular artists that Pandora selects, they cannot rewind or fast forward the songs Pandora streams, they cannot replay the songs or save them to their devices, and they cannot transfer or otherwise share the songs with friends.

Not surprisingly, then, Plaintiff's complaint does not allege a single fact suggesting that Pandora listeners have control over the songs that Pandora streams to their devices. Indeed, Plaintiff admits (repeatedly) that his entire lawsuit hinges on a single allegation: that Pandora places "a digital copy of the song currently playing" on the listener's computer, and "upon completion of the track, Pandora removes the track" from the computer. (Complaint, ¶ 20, Appx. 143a, referred to in Pl's Br., pp. 4, 9, 14, 17, 18, 20.)[3] This is the complete sum and substance of Plaintiff's claims regarding sound recordings, yet this bare statement says nothing about whether Pandora listeners can control the songs that are streamed to their electronic

[3] In one place in his brief Plaintiff now suggests, but does not explicitly state, that it is the listeners themselves (and not Pandora) who remove the digital copy of music files from listeners' computers when the files finish streaming. (Pl's Br., p. 7). This new argument is not only factually inaccurate, it is contrary to the allegations in the complaint and in the remainder of Plaintiff's brief.

devices. Indeed, it alleges the opposite: (1) it is Pandora, and not the listener, that places a temporary music file on the listener's hard drive to allow for the uninterrupted streaming of music content; and (2) it is Pandora, and not the listener, that removes the music file when it is done streaming. Accordingly, Plaintiff has failed to state a claim under the VRPA, and this Court should answer the certified question in the negative.

COUNTER-STATEMENT OF FACTS

Because Pandora's original brief contains a more detailed statement of facts, Pandora respectfully refers the Court to the discussion contained therein. Here, Pandora merely responds to Plaintiff's accusation that Pandora included extra-record factual assertions in its brief to this Court. (Pl's Br., p. 9, n. 2.) Specifically, Plaintiff takes issue with the following statements in Pandora's brief: (1) that Pandora listeners lack the ability to choose the music streamed to their devices; (2) that Pandora listeners lack the ability to copy or save songs; (3) that Pandora listeners lack the ability to share or transfer songs; (4) that subscribers to Pandora's paid service also lack the ability to choose the music that is streamed to their devices; (5) that Pandora listeners are only able to skip a limited number of songs per hour; and (6) that Pandora listeners cannot re-play a song. (*Id.*, pp. 9-10, n. 2.)[4] Contrary to Plaintiff's assertion, these facts (which, tellingly, Plaintiff does not dispute) were presented in Pandora's district court motion to dismiss (N.D. Cal. Case No. 11-4674 ECF No. 20, p. 9), its brief in the Ninth Circuit (Appx. 184a), are contained in materials incorporated into the complaint, and/or are contained in the Pandora terms of service, all of which are part of the record. Moreover, it makes no difference whether these

[4] Plaintiff also takes issue with the claim that the temporary music files Pandora places on listeners' computers typically consist of only portions of songs rather than the songs in their entirety. Plaintiff claims that the temporary files must consist of "full copies of songs" because he found a website with instructions on how to illegally pirate music from Pandora. (Pl's Br., p. 10, n 2.) This purported authority is outside the record, has no external indicia of reliability, and was apparently written by a criminal. Moreover, the point is irrelevant. It does not matter whether the temporary files consist of full songs or portions of songs. Either way, Pandora does not provide its listeners with the ability to control the songs or portions thereof.

easily-verifiable facts are inside or outside the record. The relevant inquiry is not whether these facts are true (they are), but whether Plaintiff can plead facts showing that he has control over the songs that Pandora streams to his device. The above-listed attributes of the Pandora service are indicative of the types of things that Plaintiff should have, but failed to, address in his complaint.[5] To show control, for example, Plaintiff needed to plead facts showing that Pandora listeners can choose songs, which they can then download and use for a period of time, rewinding and replaying if they like. The complaint is missing these essential allegations because they are factually inaccurate and, therefore, cannot be made.[6]

ARGUMENT

To support his claim, Plaintiff stretches the relevant statutory terms beyond their commonly understood and dictionary definitions. He also relies on claims outside his complaint, and attempts to analogize Pandora to services and scenarios that bear no meaningful resemblance to Pandora. Plaintiff cites to numerous extra-record websites, many of which have no indicia of reliability whatsoever, to support his argument that the VRPA must cover Pandora's services because they are, according to him, analogous to brick and mortar libraries and services such as Apple, Netflix, and Amazon. Yet the complaint contains no such allegations and, in any event, Plaintiff ignores crucial, dispositive, distinctions between Pandora and these other services. And despite these strained definitions, references to unreliable materials, and incongruous analogies,

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[5] Not only are these facts easily verifiable through simple engagement with the Pandora Service, they are also within Plaintiff's own knowledge and, therefore, easily pled. For example, as a Pandora listener, Plaintiff can easily determine whether he is able to select a particular song or artist, fast-forward or rewind a song, or replay a song that he enjoyed.

[6] Ironically, after wrongfully accusing Pandora of relying on materials outside of the record, Plaintiff himself then cites to, and relies upon, numerous third-party websites, not authenticated, and clearly "outside of the record". *See, e.g.*, *How to Move Downloaded Pandora Songs To iTunes Library!* , http://www.se7ensins.com/forums/threads/how-to-movedownloaded-pandora-songs-to-itunes-library.804959/ (Pl's Br., p. 10); *What it is*, http://www.dzancbooks.org/ebook-club/ (Pl's Br., p. 19).

Plaintiff still fails to identify a single example in which a "renter" or "borrower" has as little choice or control over an item as a Pandora listener has over the music that is streamed to his or her device. For all these reasons, this Court should accept the certified question from the Ninth Circuit and find that Deacon has failed to allege that Pandora "rents" or "lends" sound recordings within the meaning of the VRPA.

I. All Commonly Accepted Definitions Of The Terms "Rent" and "Lend" Demonstrate that Pandora Does Not "Rent" Or "Lend" Music To Its Listeners.

Both parties agree that this Court may look to dictionary definitions to guide its interpretation of the VRPA. However, the dictionary definitions Plaintiff cites only confirm that the commonly-understood definitions of "lend", "rent", and "borrow", require an element of control or a volitional act that Plaintiff has not alleged, and cannot allege.

Plaintiff cites the Black's Law Dictionary (9th ed 2004) definition of "lend" as "[a]n act of lending: a grant of something for temporary *use*" (Pl's Br., p. 11, emphasis added). Plaintiff omits the remainder of that definition which, as the District Court noted, requires, "*that the thing or its equivalent be returned*". (Dist. Ct. Order, p. 10, Appx. 21a, emphasis in original, also citing Black's Law Dictionary (9th ed. 2004).) In fact, later in his brief, Plaintiff suggests that returning is *not* necessarily an element of lending, (Pl's Br., p. 18, n. 12), ignoring his own cited authority. Plaintiff also cites *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994) as defining "lend" as "a grant of temporary *use* of something", and cites the Merriam-Webster Dictionary definition of "lend" as "to put at another's temporary disposal." (Pl's Br., p. 11, emphasis added.) That same dictionary defines "disposal" as "the power or authority to dispose

or make use of as one chooses." Merriam-Webster online dictionary, definition of "disposal," http://www.merriam-webster.com/dictionary/disposal (last visited July 14, 2015).[7]

The complaint does not allege any of these things. This is not surprising. The only sound recording referenced in Plaintiff's complaint is a temporary file Pandora placed on his computer, but Pandora's placement of a temporary music file on a listener's computer is not equivalent to the listener using, or having the ability to control, that music file. Nor can listeners "dispose or make use of" the files as they choose. And Plaintiff does not allege that Pandora listeners "return" the music files to Pandora (a necessary characteristic of "renting", "lending", and "borrowing"); to the contrary, the complaint alleges that *Pandora* deletes the music files from the listener's computer when they are finished streaming. (Complaint ¶ 20, Appx. 143a.) Plaintiff makes this point himself when he admits that "Pandora users do not return the sound recordings to Pandora." (Pl's Br., p. 18, n. 12.) As the district court held in dismissing Plaintiff's complaint:

> The actual songs played by Pandora are selected by Pandora, not the subscriber….The temporary song file used to facilitate the streaming process is controlled at all times by Pandora; Pandora places the file on the subscriber's computer and Pandora deletes the file when the song is over….There are no allegations that the subscriber engages in any volitional activity with respect to the temporary file, which exists solely to facilitate the streaming process so the subscriber can listen to the song.

(Dist. Ct. Order., p. 11, Appx. 20a.)

To obfuscate things further, Plaintiff then uses the terms "renting" and "lending" interchangeably to argue that "renting" (like "lending") need not require payment. (Pl's Br., p. 14, n. 10.) He cites no authority for this proposition. Nor does he rebut the myriad authorities

[7] Plaintiff does not dispute the district court's holding that "the 'use' of something requires a volitional act" (Dist. Ct. Order, p. 8, Appx. 19a) and apparently accepts this, as his brief argues that listeners "use" and have "some control over" the sound recordings.

holding that "renting" requires payment in exchange for use. (*See* authorities cited in Pandora's prior Brief, p. 14.)

In sum, the dictionary definitions Plaintiff cites show that Pandora does not "rent" or "lend" sound recordings, and Pandora listeners do not "borrow" them. Nor does common usage support Plaintiff's claims. As Pandora pointed out in its initial brief, to which Plaintiff did not respond, nobody ever says they are turning on the radio to "borrow" some tunes, or that a certain radio station "lends" great music.

II. Plaintiff's Own Authorities Show That the VRPA Does Not Cover Pandora's Services.[8]

Apparently conceding that listening to a Pandora song is a passive activity, Plaintiff relies on *People v Flick*, 487 Mich 1; 790 NW2d 295 (2010), to argue that "passive use" still constitutes "control" for purposes of "lending" or "borrowing". (Pl's Br., pp. 16-17.) *Flick* says no such thing.[9] In fact, in *Flick*, this Court specifically noted that the "defendants did more than passively view child sexually abusive material." 487 Mich at 16. Rather, the Court found that the defendants "possessed" child pornography because they had taken "volitional actions" and many "intentional affirmative steps . . . to gain actual physical control" of the images, including searching and paying for the images, and deleting some images. *Id.* at 16-17. Plaintiff has not alleged, and cannot allege, that he took similar "volitional actions" with respect to the sound recordings streamed by Pandora – he could not seek out, affirmatively select, pay for, or

[8] Plaintiff cites virtually no VRPA cases and both parties agree that this Court should accept the certified question due to the lack of relevant case law. Plaintiff briefly argues the Michigan pleading standards (Pl's Br., p. 8), but this is a federal case filed in the Northern District of California, and the certified question therefore has nothing to do with whether the complaint would be deemed compliant with the Michigan Court Rules.

[9] *Flick* involved a conviction for possession of child pornography stored on a computer, and the Court was concerned with the meaning of the term "possesses" in the relevant statute. The terms at issue here—"lend," "rent", "borrow" and "use" —were nowhere at issue.

affirmatively delete, any specific sound recording.[10] (The complaint identifies the temporary Internet files as the "song currently playing"(Complaint ¶ 20, Appx. 143a)—*not* a specific sound recording Plaintiff selected.)

Flick also undercuts Plaintiff's position that the mere placement of a temporary file on a listener or viewer's computer constitutes "use". Contrary to Plaintiff's argument, *Flick* does not stand for the proposition that "control" over an image is established any time a person passively views that image on his or her screen, leading to creation of a temporary file on their computer. Rather, the *Flick* Court specifically held that "the contraband depictions at issue are the 'electronic visual images' or 'computer images' on his computer screen, *and not the automatically created temporary Internet files.*" 487 Mich at 17 (emphasis added). Thus, what established the defendants' liability was "the many intentional affirmative steps taken by the defendant to gain actual physical control" over the images that led to creation of the temporary files, not the existence of the temporary files themselves. The Court also noted the significant degree of "dominion or control" each defendant could exercise over the materials at issue:

> For example, defendants could: (1) print a hard copy of the depiction, (2) resize it, (3) internally save it to another folder on the hard drive, (4) externally save it using a CD–R or USB flash drive, (5) set the depiction as a screen saver or background theme, (6) share the depiction using a file-streaming network, (7) e-mail it, (8) post the depiction as a link on a website, (9) use the depiction to create a video or slide show, or (10) delete the depiction from the hard drive.

Id. at 17. Here, Plaintiff has not alleged, and cannot allege, that he had the ability to exercise control over any temporary file Pandora placed on his computer, let alone the significant degrees of control this Court identified in *Flick*.

[10] Simply registering with Pandora cannot be considered a "volitional action" as Plaintiff suggests (Pl's Br., p. 17), because the mere act of registration did not, as Plaintiff claims, "cause[] music files to be delivered" to his computer.

The only specific aspects of "control" over the sound recordings Plaintiff identified are the ability to skip, pause, and, he claims, "delete" songs. First, contrary to Plaintiff's assertion, the Ninth Circuit did not "expressly rule[] that the facts about Deacon's ability to pause, skip and delete songs are part of the record because they were introduced in the Complaint by reference to, and reliance on, Pandora's Form S-1." (Pl's Br., p. 16, n.11, citing Appx. 290a; *see also* Pl's Br., p. 21, n.14.) Plaintiff made no allegations whatsoever about the "ability to pause, skip and delete songs" in the complaint. And what the Ninth Circuit actually said was, "when a song is currently streaming on a user's computer through Pandora's service, the user can stop the song from playing by pressing the skip button or by closing the browser." (Appx. 290a.) Neither the Ninth Circuit's opinion, nor Pandora's Form S-1, state anything about pausing or deleting songs. Second, Plaintiff does not dispute that Pandora limits listeners' ability to skip songs to a certain amount per hour (indeed, this can be easily verified by Plaintiff, or by the Court). Third, as discussed above, a listener does not have the ability to "delete" a song. Rather, and as the complaint alleges, *Pandora* removes the song file from the user's device once it is finished streaming—regardless of any action taken by the listener. Last, it is notable that, rather than identifying ways in which one can listen to a sound recording Pandora streamed, Plaintiff instead identifies ways in which one can *not* listen to the recording. This is not use; it is non-use.

Plaintiff's other case, *Bailey v United States*, 516 US 137; 116 S Ct 501; 133 L Ed 472 (1995), involved interpretation of the term "use" in a statute pertaining to use of a firearm in connection with a drug trafficking crime. There, the Court concluded that "use" required a showing of *more* than mere possession, and required instead "active employment" of the weapon. Thus, under the Court's interpretation of "use" in *Bailey*, merely storing a gun in one's

house "without ever brandishing it" (Pl's Br., p. 17) would not, in fact, constitute "use" of the weapon, as Plaintiff claims.[11]

Thus, to the extent Plaintiff's cited cases are applicable at all, those cases support Pandora, not Plaintiff.

III. The Allegedly Analogous Services Identified By Plaintiff Do Not Support His Claims.

In an effort to try and shoehorn Pandora into the terms "lending" or "renting", Plaintiff goes well beyond his complaint and invokes materials outside the record—mostly citations to websites of questionable reliability (including Wikipedia, under which, in theory, a party could write an entry and then cite it in their own brief as "authority")—in an attempt to analogize Pandora's service to those provided by other entities. The complaint does not allege that Pandora's services are analogous to services provided by these other entities; in fact, the complaint does not say anything about these other entities or services at all. But in any event, all of Plaintiff's attempted analogies fail.

Plaintiff begins by seizing upon one of Pandora's corporate filings which describes Pandora's music collection as a music "library". (Pl's Br., pp. 3, 11-12). In essence, Plaintiff argues that because public libraries "lend" materials, and because Pandora possesses a music "library", Pandora must "lend" as well. This argument conflates two separate meanings of the terms "library". Having a "library" of songs from which Pandora selects music for its listeners is far different from operating a traditional "library" from which one can borrow (and then

[11] Indeed, following *Bailey* Congress amended 18 USC 924(c) by removing "use" of a firearm from the statute, altering the text to read "in the furtherance of any such crime, *possesses* a firearm . . .." 18 USC 924(c)(1) (emphasis added); *Abbott v United States*, 562 US 8, 15; 131 S Ct 18, 24; 178 L Ed 2d 348 (2010) (noting that the pre-1998 text in *Bailey* referred to "use" rather than "possession.")

return) materials.[12] Moreover, the term "music library" is common in the terrestrial radio industry, yet terrestrial radio stations do not "lend" music to listeners.[13]

Not surprisingly then, Pandora functions differently than the "libraries" Plaintiff identifies. Among other things, traditional public libraries allow patrons to choose and exercise control over the specific materials borrowed for the full term of the borrowing period. In contrast, Pandora listeners cannot choose the particular songs that Pandora streams to their devices, nor can they download songs and transfer them to other devices, or listen to them as often as they would like during a defined period. This point is perhaps best illustrated by Plaintiff's partial quotation of the West Bloomfield library website, in which Plaintiff conveniently omits the language italicized below (Pl's Br., p. 12): "Downloadable audiobooks, or eAudiobooks, are similar to books on CD except that you will use your home computer or smartphone/tablet device to download the title. Once downloaded, you can listen to the audiobook on your computer, *transfer it to a compatible portable device, or listen on a smartphone/tablet*. When the audiobook expires, it cease [sic] working, and you can remove it from your computer or device". West Bloomfield Township Public Library, eLibrary – eAudioBooks FAQs, www.wblib.org/elibrary/eaudiobooksfaq.php (last visited July 15, 2015).

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[12] There are numerous definitions of the word "library" that do not involve lending or borrowing. For example, the Library of Congress does not allow individuals to borrow materials. *See* Library of Congress, Frequently Asked Questions, http://www.loc.gov/about/frequently-asked-questions/#checkout_bks (last visited July 29, 2015) ("Who can use the Library and check out books? The Library of Congress is a research library, and books are used only on the premises by members of the public."). Similarly, the Merriam-Webster Dictionary definition of "library" includes "a collection of similar things (such as books or recordings)," and includes the following example of usage of the word "library": "He has an impressive library of jazz records." Merriam-Webster online dictionary, definition of "library," http://www.merriam-webster.com/dictionary/library (last visited July 14, 2015).

[13] *See, e.g., KFOX Inc v United States*, 510 F2d 1365, 1368; 206 Ct Cl 143, 150 (1975) (discussing portion of radio station purchase price allocated to the station's "Record Library"); *Infinity Broadcasting Corp v Great Boston Radio II*, unpublished opinion of D Mass, issued Aug 18, 1993 (Case No. 93-11161-WF) (attached as Ex. A); Peter DiCola, Copyright Equality: Free Speech, Efficiency, and Regulatory Parity in Distribution, 93 B.U. L. Rev. 1837, 1869 (2013) (referring to AM and FM radio stations' "large libraries of music.")

Plaintiff also cites other public library websites that give patrons the option of "downloading individual songs" from a service called Freegal, or borrowing albums from a service called Hoopla. (Pl's Br., p. 13, n. 4.) Here too though, one can select specific songs and have access to them for a certain period of time. And in the case of downloading, the patron has access to the content in perpetuity, which is far different than listening to Pandora.

Plaintiff's overreaching reaches its apex with his assertion that "digital rental services . . . all operate just like Pandora." (Pl's Br., pp. 13-14.)[14] Again, the complaint contains no allegations in this regard, but in any event, Plaintiff is flat wrong. Plaintiff points to Amazon.com; Apple, Inc.; Movies on Demand; and Vudu, Inc; as businesses purportedly similar to Pandora. Unlike Pandora, these businesses: (1) charge consumers a fee for specific video or music files; and (2) allow their customers to choose the particular video or music file they would like to rent. Also unlike Pandora, users of these services can watch or listen to the rented recordings as many times as they wish during the rental period. *See, e.g.*, Vudu.com, Support, http://support.vudu.com/?supportPage=answers/list (last visited July 13, 2015)) ("When you rent a movie, you have that movie for 24hrs to watch as many times as you like. You do not need to pay anything additional to watch the movie more than once during the 24hr rental period."); Apple.com, Support, https://support.apple.com/en-us/HT201611 (last visited July 13, 2015) ("You have 30 days to start watching a movie after you rent it. . . . You can watch the movie as often as you like until it expires."); Movies on Demand on Cable, Frequently Asked Questions, http://www.rentmoviesondemand.com/faqs (last visited July 13, 2015) ("With Movies on Demand, you can watch whenever you want, restart it, pause, rewind and you have up to 24 or

[14] By using vague and blanket terms like "internet media distribution industry" and "digital rental services" (Pl's Br., p. 13), Plaintiff disregards the many significant differences in the ways in which Internet companies operate. Just because an entity might qualify as a "digital rental service" or operate in the "internet media distribution industry" (whatever that means) does not automatically make the company subject to VRPA.

48 hours to watch the program.") Nor does Pandora operate "like Netflix's 'streaming'" service, as Plaintiff asserts. (Pl's Br., p. 27.) According to its website, Netflix has "thousands of movies and TV show episodes available to watch instantly . . . There are never any commercials no matter how much you watch, *and you can pause, rewind, fast forward or re-watch as often as you like*. It's really that easy!" Netflix, Help Center, (https://help.netflix.com/en/node/%20412?catId=en%2F131 (last visited July 13, 2015) (emphasis added). Netflix lets a user choose exactly what they want to watch, at the time and in the order they want, as many times as they want, and without any commercials or advertisements. Pandora does not. All services are not the same, and Pandora is unlike any of the others in Plaintiff's comparison group. More to the point, no court has ever found that these other services are subject to the VRPA, so Plaintiff's attempted comparisons aren't even relevant.

Plaintiff's attempt to analogize Pandora to eBook and "digital album of the month clubs" similarly fails. (Pl's Br., p. 19.) Setting aside the fact that Plaintiff once again improperly invokes allegations and information outside of the complaint and record, the comparisons also fail because, unlike Pandora, these clubs: (1) require payment in exchange for particular content chosen by the subscriber; and (2) allow users to choose the specific books and recordings they wish to download or purchase. For example, Dzancbooks.org sends users a *link* "allowing [subscribers] to immediately download and enjoy the month's book." See Dzanc Books, What It Is, http://www.dzancbooks.org/ebook-club/ (last visited July 12, 2015). Subscribers, of course, choose whether or not to download the book from the link. Similarly, "Feedbands," one of the two "album of the month" clubs referenced in the 2013 internet article cited by Plaintiff, allows subscribers to choose which albums they wish to purchase and keep. Feedbands, Our Monthly Vinyl Release Delivered To Your Door, https://feedbands.com (last visited July 12, 2015).

Further, according to their websites, both services allow subscribers to choose specific titles from the services' catalogs of available titles in lieu of receiving titles chosen by the service. Most significantly, unlike Pandora listeners, subscribers or patrons of these services have the ability to select the sound recordings or eBooks they want to purchase, and then have the ability to exercise significant control over the item or items selected.

The same is true of library patrons, Blockbuster customers, and renters of apartments, all of whom make cameos in Plaintiff's brief. (Pl's Br., p. 18.) These individuals are able to affirmatively choose the book, movie, or apartment they wish to borrow or rent and, once borrowed or rented, are able to exercise control over the items at issue. Among other things, these individuals have the ability to read the book or watch the movie many times during the rental period, go back and forth between chapters of the book or parts of the movie, or, in the case of an apartment, decorate, furnish, entertain, and let people in or out.[15]

Finally, Plaintiff's reliance on "borrowing" an egg or match does not help his cause. While it is conceivable that someone could ask to "borrow" such items, "borrowers" in these contexts choose what it is they are borrowing and are then able to exercise the ultimate degree of control over the item at issue, taking permanent possession of it as well as extracting all of its value. Pandora listeners do not have the ability to exploit a song in the same way; they do not take permanent possession of the song or exercise any control over it.

In sum, Plaintiff is unable to identify a single instance of "borrowing" or "renting" in which the "borrower" or "renter" has as little control over the item in question as a Pandora

[15] Apparently Plaintiff believes degrees of use and control are irrelevant, as he seems to equate skipping a Pandora song (even once) with renting an apartment (possibly even for decades), with both, in his book, constituting equal "possession, use and control".

listener has over a sound recording. The futility of Plaintiff's attempted comparisons merely highlight the reasons why his complaint was properly dismissed.

IV. Plaintiff's Remaining Arguments Mischaracterize Pandora's Positions And Are Without Merit.

Plaintiff contends that, because Pandora's terms prohibit copying and distribution of sound recordings (among other things), they contain "restrictions" that are "nearly identical" to restrictions imposed by other businesses that "rent" or "lend". (Pl's Br., pp. 21-22.) However, Plaintiff cannot dispute that Pandora's terms nowhere characterize its service as involving "rentals" or "loans". Moreover, a comparison of the different terms for the different entities actually helps Pandora, because, unlike Pandora, most of the allegedly "analogous" services *do* use the terms "lend," "rent," and/or "borrow" when describing their services.[16] And contrary to Plaintiff's assertion, Pandora has not argued that it can "impose copyright licensing restrictions on" the listener. (*Id.*, p. 22.) Rather, Pandora's argument is that it cannot pass on to listeners rights that Pandora itself does not have. Because Pandora does not have the right to copy, modify, etc., the songs streamed through its service, its listeners are necessarily subject to the same restrictions. Pandora's terms make these limitations clear, so listeners cannot claim they are unaware of their inability to exercise control over the sound recordings.

[16] *See, e.g.*, Vudu.com, Terms of Service, http://www.vudu.com/termsofservice.html (last visited July 14, 2015) ("Currently, you can either 'rent' or 'purchase' Content through the VUDU Service."); Redbox, Terms of Use, http://www.redbox.com/terms#anchor2 (last visited July 14, 2015) ("The Rental Terms available HERE explain the rules for *renting* items from Redbox through our kiosks (including those rentals that originate with a reservation at www.redbox.com, via a Redbox mobile application or another Redbox Platform)" (emphasis added)); West Bloomfield Township Public Library, Circulation Policy No. 1, https://www.wblib.org/files/aboutus/policies/Statement%20of%20Purpose,%20Library%20Card%20Elegibility.pdf (last visited July 14, 2015) ("[t]he library will determine who is eligible to *borrow* materials." (emphasis added)).

Plaintiff's response to Pandora's discussion of cases decided under the Copyright Act (Pl's Br., pp. 20-22) is similarly inapposite. Of course Pandora understands that Plaintiff is "not pursing copyright claims", (*id.*, p. 23), but this Court is free to consider how the terms "renting" and "lending" have been interpreted in the context of sound recordings under the Copyright Act, in helping it interpret those terms in the context of sound recordings under the VRPA.[17] Plaintiff does not dispute that numerous courts have held that streaming internet radio services are *not* in the business of renting or lending sound recordings, and that Pandora in particular need not pay the royalties applicable to lending or renting, but only the "public performance" royalty.[18] Nor does Plaintiff argue that these cases were wrongly decided. Instead, Plaintiff asserts that "distinctions between public performance and renting or lending" have no relevance "to the purpose of the VRPA . . .." (*Id.*, p. 24.) But those distinctions are quite relevant to interpretation of the terms "renting" and "lending", and Plaintiff is wrong to urge this Court to disregard the statutory language in the name of effectuating an alleged statutory purpose. *See, e.g., Twichel v MIC Gen Ins Corp*, 469 Mich 524, 531; 676 NW2d 616 (2004) ("[t]he focus of statutory interpretation must be on the language used by the Legislature. The courts are not free to manipulate interpretations of statutes to accommodate their own views of the overall purpose of the legislation.") (citations omitted).[19]

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[17] *Allied Artists Pictures Corp v Rhodes*, 496 F Supp 408 (SD Ohio, 1980) (Pl's Br., p. 23) is inapplicable because Pandora has not argued that the VRPA is preempted by the Copyright Act.

[18] *See In re Pandora Media, Inc.*, 6 F Supp 3d 317 (SDNY, 2014), *aff'd*, _ F3d __ (CA 2, 2015); *Intercollegiate Broad Sys, Inc v Copyright Royalty Bd*, 68 F3d 1332, 1334 (CA DC, 2012), *cert denied*, 133 S Ct 2723, 186 L Ed 2d 192 (2013); *United States v ASCAP*, 627 F3d 64 (CA 2, 2010); *Arista Records, LLC v Launch Media, Inc*, 578 F3d 148 (CA 2, 2009); *Bonneville Int'l Corp v Peters*, 347 F3d 485 (SDNY, 2014).

[19] Although Plaintiff asserts, without support, that broadcast radio and TV "do not keep documentation of consumers' viewing or listening habits" (Pl's Br., p. 27), that is not likely true, particularly in this age of satellite radio and TV where particular content is requested, where particular channel "packages" are selected, and where digital video recorders are prevalent. And even assuming that broadcast radio and TV services do maintain records regarding consumers'

Pandora does not argue, as Plaintiff claims, that the VRPA only applies to technologies that existed in 1988. (Pl's Br., p. 27.) Rather, Pandora argues that this Court can and should consider the fact that the video and sound recording world has changed drastically since the VRPA was enacted and, although the Legislature could have amended the VRPA to encompass the ensuing explosion in technology, it has not done so. *Howell Educ Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 234-35; 789 NW2d 495 (2010) is instructive. In that case the court noted that application of an older statute to newer technology "is best left to the legislature" and in such cases, the courts should proceed with caution. And contrary to Plaintiff's claims (Pl's Br., p. 28), a finding that Plaintiff has stated a claim under the VRPA would indeed greatly expand the scope of the VRPA. *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001) (Pl's Br., p. 28), does not compel a different result. The question in *Stone* was whether this Court should find, as a matter of law, that a conversation held on a cordless telephone can never be a "private conversation" under Michigan's eavesdropping statutes. This Court determined that such a finding would render null a portion of the eavesdropping statute, but no such concern exists here.

Finally, although Plaintiff makes passing reference to the fact that there was no discovery taken in this case, no amount of discovery would change how Pandora operates. More importantly, Plaintiff should not need any discovery to ascertain what *he*, as a purported Pandora listener, can and cannot do with the song recordings Pandora streamed to his device – Plaintiff's control over those recordings (or lack thereof) is within his own exclusive knowledge.

CONCLUSION

Pandora respectfully requests that this Court grant the Ninth Circuit's request, and find that: (1) Pandora is not in the business of "renting" or "lending" sound recordings within the

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viewing or listening habits, those records would not fall within the VRPA unless they pertained to materials that were lent, rented, or borrowed from such providers.

meaning of VRPA; and (2) Pandora listeners like Deacon do not "rent" or "borrow" sound recordings from Pandora and are therefore not "customers" under the VRPA.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants.

Respectfully submitted,

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